Interaction Between Civil Commitment and Protective Services: A Case Study

By Michael J. Leiber*

I. INTRODUCTION

In the 1960's and 1970's, judicial and legislative scrutiny paved the way for procedural safeguards and narrow substantive criteria in civil commitment legislation. Some scholars have argued that implementation of these laws has resulted in the misuse of the civil commitment

* Ph.D. candidate, School of Criminal Justice, State University of New York at Albany. The author would like to thank James R. Acker, Margaret Farnworth, Dianne Greenley, Nancy Howland, Katherine M. Jamieson, and Marvin D. Krohn for their helpful comments and suggestions. The views expressed in this article are the sole responsibility of the author. An earlier version of this paper was presented at the 1986 annual meetings of the American Society of Criminology in Atlanta.


3. "Civil commitment" is a form of non-criminal confinement for individuals who are judicially found mentally disabled. BLACK'S LAW DICTIONARY 222-23 (5th ed. 1979).
law itself,4 guardianship and/or conservatorship proceedings5 and the criminal justice system.6

4. Steir & Stoebe's examination of Iowa's civil commitment process and Warren's examination of California's process found, for example, that in both states public defenders acted in the "best interests" of the client rather than proceeding according to statutory intent which required an adversarial confrontation between defense and the state. Accordingly, defense attorneys rarely called witnesses, used cross examination or mounted an aggressive defense. Warren points out that in California, although a minority of persons were adjudged at the petition hearing to be "dangerous to others," evidence for the imminence and seriousness of dangerousness was not offered. Steir & Stoebe, supra note 2. See also Warren, Involuntary Commitment for Mental Disorder: The Application of California's Lanterman-Petris-Short Act, 11 LAW & Soc'y REV. 629, 633-42 (1977). Hiday, Reformed Commitment Procedures: An Empirical Study in the Courtroom, 11 LAW & Soc'y REV. 651 (1977); Zander, Civil Commitment in Wisconsin: The Impact of Lessard v. Schmidt, 2 WIS. L. REV. 503 (1979). For a general overview, see Peters, Miller, Schmidt & Meeters, The Effects of Statutory Change on the Civil Commitment of the Mentally Ill, 11 LAW AND Hum. BEHAV. 73 (1987).

5. Guardianship traditionally refers to the protection of an individual who is unable to care for himself; conservatorship is the protection and care of a person's estate. These two terms are, however, often used interchangeably. CONN. GEN. STAT. ANN. §§ 45 (70a)(a), (70a)(b) (West 1986). Research by Lamb, Solkin and Zusman on the impact of California's reformed civil commitment law revealed that individuals not meeting the statutory criterion of "dangerous to self or others," were processed through conservatorship proceedings as gravely disabled to prolong confinement. Lamb, Solkin, & Zusman, Legislating Social Control of the Mentally Ill in California, 138 AM. J. PSYCHIATRY 334 (1981); see also Morris, Conservatorship For the 'Gravely Disabled': California's Nondeclaration of Nonindependence, 15 SAN DIEGO L. REV. 201 (1978). In California, an individual is "gravely disabled" if, as a result of mental disorder, s/he is unable to provide for his or her food, clothing and shelter. The statutory durational limits for civil commitment in California is relatively short: persons considered dangerous to others may be committed for 90 days (renewable for additional 90-day periods) CAL. WELF. & INST. CODE §§ 5300, 5304 (West 1974)), and 14 days (not renewable) for individuals dangerous to themselves (CAL. WELF. & INST. CODE § 5361 (West 1974)). The category of conservatorship permits, however, the longest period (one year, renewable) and the fewest protections (CAL. WELF. & INST. CODE § 5350 (West 1984)). Given the structure of California's mental health law, it has been argued that it is inevitable that the conservatorship provision will be the one "escape hatch" to prolong confinement of mentally disabled persons. See A. STONE, MENTAL HEALTH LAW: A SYSTEM IN TRANSITION 64 (1975); Wexler, Mental Health Law and the Movement Towards Voluntary Treatment, 62 CALIF. L. REV. 671 (1974).

6. See Abrahamson, The Criminalization of Mentally Disordered Behavior: A Possible Side Effect of a New Mental Health Law, 23 Hosp. & Community Psychiatry 101 (1972); Whitmer, From Hospitals to Jails: The Fate of California's Deinstitutionalized Mentally Ill, 50 AM. J. Orthopsychiatry 65 (1980). For some contrasting findings see Bonovitz & Bonovitz, Diversion of the Mentally Ill into the Criminal Justice System: The Police Intervention Perspective, 138 AM. J. PSYCHIATRY 973 (1981); Hochstedler, Criminal Prosecution of the Mentally Disordered, 64 LAW & Soc'y REV. 279 (1988). In short, due to methodical shortcomings, it is difficult to assess the extent to which the "psychiatrization of criminal behavior" or the "criminalization of mental disorder" has occurred. Teplin, The Criminalization of the Mentally Ill: Speculation in Search of
One commentator, Wexler, suggests that this occurrence may be explained by viewing mental health law as a system with various interlocking components which are dependent upon the environment in which they operate. One of Wexler’s major points is that the “system is laden with pressure points,” such as society’s fear of the mentally ill and/or lack of community and financial resources. Therefore, reform in one subsystem may induce legislative solutions in other facets of mental health legislation. In addition, these reforms may lead to the adoption of methods of processing which in turn will reduce perceived “pressure” caused by changes in the civil commitment law. Based on this premise that the process of civil commitment is neither unitary nor homogeneous, research is needed to examine the interface between civil commitment law and various components within the mental health system.


8. The Structure of Civil Commitment, supra note 7, at 2, 18.

9. In Jackson, 406 U.S. at 738, the Supreme Court ruled that an incompetent defendant who is found unlikely to gain competence in the foreseeable future must be either released or civilly committed. As a result of this decision, states having strict civil commitment laws had difficulty civilly confining such persons. Many of these individuals simply did not meet the substantive criteria needed for civil commitment. In order to resolve this problem, California’s legislature amended the definition of “gravely disabled” to include not only mentally disabled persons who are unable to provide food, clothing or shelter but also to include an individual who has been found to be mentally incompetent, charged with a felony involving death, great bodily harm or a serious threat to others and is currently dangerous. See Cal. Welf. & Inst. Code §§ 5000-5400 (West 1974); the California commitment legislation pre- and post-Jackson is described in Estate of Hofferber, 167 Cal. Rptr. 854 (1980). See also supra note 7, at 12-14, for a more detailed discussion on this topic.

10. Research suggests, for example, that court procedures (continuances or stays) and professional persuasion are often used to coerce persons into “voluntary” admissions. See Lewis, Goetz, Schoenfield, Gordon & Griffin, The Negotiation of Involuntary Civil Commitment, 18 Law & Soc’y Rev. 629 (1984); Gilboy & Schmidt, ‘Voluntary’ Hospitalization of the Mentally Ill, 66 Nw. U.L. Rev. 429 (1971); Hiday, Court Discretion: Application of the Dangerousness Standard in Civil Commitment, 5 Law & Hum. Behav. 275-89 (1981). A “voluntary” admission status is used as a method to negotiate justice, similar to the role plea bargaining plays in the criminal court system; the state avoids time-consuming and costly court proceedings, while the individual does not have to go through the trauma of a court trial, or of being labeled “mentally ill.” However, coercion, threats, and a cursory presentation to the individual as to alternatives to voluntary confinement permeates the process. See Gilboy & Schmidt, supra at 442. The individual may receive a lesser sentence in terms of the length of confinement, psychiatric care or the administration of medication, but the choice entails a waiver of constitutional rights.
The discussion that follows addresses this issue by examining the interactions between the processes of civil commitment, protective services and in particular, protective placement. The analysis centers primarily on Wisconsin’s legislation and the possible overlap that may exist between these methods of processing mentally disabled persons. Wisconsin was chosen for the analysis because this state’s civil commitment law is stringent in due process protections in comparison to the protective services legislation, which lacks substantive specificity and procedural safeguards.11

This contrast in concerns for legal criteria in mental health legislation provides an excellent opportunity to examine whether persons who may be eligible for civil commitment are processed instead through the less cumbersome process of protective services. “Protective services” is the delivery of services to protect persons from exploitation, abuse and neglect.12 “Protective placement” is a component of protective services and consists of voluntary or involuntary confinement in an institution or inpatient facility for individuals who require care and custody and are suffering from disabilities which are likely to be permanent.13 Civil commitment, on the other hand, is concerned with mentally ill persons who are suffering from short-term disabilities which are treatable.14

Information is presented which suggests that young males exhibiting dangerous behavior who need acute care (treatment) are protectively placed in nursing homes as opposed to being civilly committed in psychiatric facilities. The inappropriate confinement of these individuals appears to be a means of coping with situations where the statutory standards for involuntary civil commitment cannot be met. This occurrence results in liberty violations and serious treatment shortcomings. Before proceeding to a discussion of these issues, background information is provided on the development of protective services and protective placement nationally, and in Wisconsin.

II. PROTECTIVE SERVICES

Through the late 1950’s and early 1960’s a series of meetings and national conferences convened to discuss the needs of the developmentally impaired elderly with the intentions of establishing preventative and supportive services. At this time protective service legislation be-

came embodied in several pieces of federal legislation: the 1962 and 1965 amendments to the Social Security Act; the Older Americans Act of 1965; the 1974 amendments to the Social Security Act, which included the Title XX amendments, and the 1978 amendments to the Older Americans Act.\footnote{15} These legislative enactments authorized funds for the implementation of protective services programs.

In response to Title XX, states included not only the seriously impaired older individual but the mentally retarded, the chronically mentally ill, the alcoholic, the substance abuser and "street" people.\footnote{16} Forty-six states provide protective services to adults in the Title XX programs.\footnote{17} Of this number, twenty-five states have implemented some form of protective services, while others lack a unified program.\footnote{18}

Protective services and protective placement have not received the same kind of scholarly, judicial and legislative scrutiny as the process of civil commitment.\footnote{19} Part of this might be explained by imprecise definitions of protective services.\footnote{20} Although a variety of definitions exist, in all of them, either explicitly or implicitly, are the questions regarding: an individual's mental or physical competency,\footnote{21} his or her

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\bibitem{15} J. BURR, \textit{PROTECTIVE SERVICES FOR ADULTS} 7 (1982).
\bibitem{16} \textit{Id.} at 79.
\bibitem{17} \textit{Id. See also} H. HORNBY, \textit{PROGRAM DEVELOPMENT AND ADMINISTRATION: IMPROVING PROTECTIVE SERVICES FOR OLDER AMERICANS} (1982).
\bibitem{18} H. HORNBY, \textit{supra} note 17.
\bibitem{19} A notable exception has been the work of Regan. \textit{See, e.g.}, Regan, \textit{Protecting The Elderly: The New Paternalism}, 32 \textit{HAST. L.J.} 1111 (1981) [hereinafter cited as \textit{The New Paternalism}]. \textit{See also} Regan, \textit{Intervention Through Adult Protective Services Programs}, 18 \textit{THE GERO NTOL O GIST} 250 (1978) [hereinafter cited as \textit{Intervention}]. The focus of this work, however, is primarily concerned with protective services and the elderly. Little is presented which discusses the interactions between this legislation and civil commitment.
\bibitem{20} The term "protective services" generally means services provided to prevent abuse, neglect, exploitation or abandonment. \textit{See, e.g.}, \textit{CONN. GEN. STAT. ANN.} § 46a (14)(4) (West 1985); \textit{UTAH CODE ANN.} § 55 (19)(1)(2) (1985); \textit{TENN. CODE ANN.} § 14 (25-102)(9) (1985). \textit{See also} J. BURR, \textit{supra} note 16. Protective services are so broadly defined that they may entail any kind of services to the adult. \textit{See infra} notes 22-23 and accompanying text.
\bibitem{21} Alabama's protective services statute, for example, states that a person in need of protective services is one "who, because of physical or mental impairment, is unable to protect himself from abuse, neglect or exploitation by others, . . . ." \texttt{ALA. CODE} § 38 (9)(2)(1) (1985). North Carolina's statute permits intervention on behalf of a person lacking "understanding or capacity to make or communicate responsible decisions concerning [oneself], . . . because of mental incapacity." \textit{N.C. GEN. STAT.} § 108a (101)(j) (1985); \textit{See also} \texttt{TENN. CODE ANN.} § 14 (25-103)(2)(i) (1985); \texttt{MD. ANN. CODE art.} 14, § 101(b)(0)(b)(q) (1985); Horstman, \textit{Protective Services for the Elderly: The Limits of Pares Patriae}, 40 \textit{Mo. L. REV.} 215, 217 (1975).
\end{thebibliography}
ability to function, the services needed by the person to cope with life, and whether it is "either overtly or tacitly inclusive of old people." Reference to the elderly in protective services legislation may in part be explained by its origins. Typically a definition of protective services includes all adults over age eighteen or is limited to those over sixty.

Most adult protective cases result from self-neglect or more accurately, the inability of an adult to care for him or herself any longer. This may in part be explained by the fact that most protective services are based on the justification of parens patriae (best interests of the individual) which permits intervention on the grounds that an individual: 1) is unable to care for himself; 2) "lacks the capacity to make or communicate responsible decisions;" or 3) is unable to protect himself from abuse, neglect or exploitation by others.

"Protective services" can apply to a number of social services offered by public or private agencies to assist persons with personal, financial and health problems. Services can range from home repairs to visiting

22. CONN. GEN. STAT. ANN. § 46a (14)(2)(3) (West 1985) centers on the individual's inability to perform or obtain services ranging from medical care to personal hygiene. Other provisions address whether persons are capable of adequately caring for themselves and/or protecting themselves from abuse, neglect or exploitation. See OKLA. STAT. ANN. tit. 43a, § 802 (West 1985); S.C. CODE ANN. § 43 (29)(10)(1) (Law. Co-op. 1976); ALA. CODE § 38 (9)(2)(1) (1985); M. BLENKNER, M. BLOOM, M. NIELSON, & R. WEBER, FINAL REPORT: PROTECTIVE SERVICES FOR OLDER PEOPLE, FINDINGS FROM THE BENJAMIN ROSE INSTITUTE (1974).

23. The state of New Hampshire's protective services legislation reads as follows: "Services shall include, but not be limited to, supervision, guidance, counseling and, when necessary, assistance in the securing of sanitary and nonhazardous living accommodations, and mental and physical examinations." N.H. REV. STAT. ANN. § 161 (d)(2)(III) (1985). See also statutes of North Carolina (N.C. GEN. STAT. § 108a (99) (1986)) and Oklahoma (OKLA. STAT. tit. 43a, § 801 (1977)) which include, but are not limited to, provisions for health or mental health care, food, clothing, or shelter.


25. For example, Alabama's protective services legislation covers people age 18 or older. ALA. CODE § 38 (9)(1) (1975 & Supp. 1988); see also N.Y. SOC. SERV. LAW § 473a (1)(a) (McKinney 1982).


28. See supra note 22.

29. See supra note 21.

30. See supra notes 20 & 22.

31. Horstman, supra note 21, at 217; The New Paternalism, supra note 19, at 1112.
Generally, protective services involve voluntary support services. However, many courts conduct hearings for the protection of individuals having difficulty coping with life. Protective services proceedings are often used interchangeably with the process of guardianship, conservatorship and civil commitment. Therefore, those states which utilize only “voluntary” protective services rely on civil commitment or guardianship as a means of gaining authority over an individual. Through guardianship proceedings, guardians can “voluntarily” commit or protectively place persons in mental institutions and nursing homes or consent to protective services. Some states prevent a guardian from “voluntarily” committing an individual without using the procedures for civil commitment. The majority of state statutes, however, “fail to address the question explicitly, and have generally been interpreted to allow ‘voluntary’ commitment” of an individual by

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32. See supra note 23.
34. B. SALES, D. POWELL, R. DUEZIND AND ASSOCIATES, DISABLED PERSONS AND THE LAW: STATE LEGISLATIVE ISSUES 453-662 (1982); See also Parmelee, supra note 24, at 403; Horstman, supra note 21, at 219.
35. A theoretical distinction between civil commitment and guardianship is that persons eligible for civil commitment do not necessarily have to be found incompetent and/or have a guardian appointed before s/he may be confined. See infra note 78; Horstman, supra note 21, at 1; The New Paternalism and Intervention, supra note 19. Still, some suggest that involuntary civil commitment and guardianship are one in the same. See generally Horstman, supra note 21, at 225; S. HERR, RIGHTS AND ADVOCACY FOR RETARDED PEOPLE 67 (1983). As a result, it has been argued that guardianship proceedings should be abolished. Mitchell, The Object of Our Wisdom and Our Coercion: Involuntary “Guardianship” for Incompetents, 52 S. CAL. L. REV. 1405, 1448 (1979); Alexander, Who Benefits from Conservatorship?, 13 THAL 30, 32 (1977). On the other hand, there are those who suggest that the process of guardianship should receive greater judicial and legislative scrutiny. Atkins, Towards a Due Process Perspective in Conservatorship Proceedings for the Aged, 18 J. FAM. L. 819, 824-25 (1980). The concept of “incapacity” generally refers to an individual’s inability to decide rationally what is in his or her own best interests. Ennis, Civil Liberties and Mental Illness, 7 CRIM. L. BULL. 101 (1971); A. STONE, MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION (1975). The key is the person’s ability to make decisions and not whether his or her choices seem irrational. Colvar v. Third Judicial District Court, 469 F. Supp. 424 (D. Utah 1979); Morse, A Preference for Liberty in THE COURT OF LAST RESORT: MENTAL ILLNESS AND THE LAW 77 (C. Warren ed. 1982).
36. See CONN. GEN. STAT. ANN. § 46a (20)(c) (West 1985); N.C. GEN. STAT. § 35 (1.34) (1984); CAL. WELF. & INST. CODE §§ 5000-5400 (West 1974); The New Paternalism, supra note 19, at 1112-27 (1981); Mitchell, supra note 35, at 1411; Morris, supra note 5.
his or her guardian.\textsuperscript{38}

Currently, twelve states have established procedures for intervention in the specific context of protective services legislation.\textsuperscript{39} Through special court proceedings social agencies can provide emergency services,\textsuperscript{40} involuntary protective services\textsuperscript{41} and protective placement.\textsuperscript{42} In short,


\textsuperscript{40} In ten of the twelve states which have protective services legislation there is a provision for emergency detention. In general, a situation must exist where a person is unable to provide for his or her "basic needs for shelter, food, clothing or health care, and whose health or safety is in immediate danger . . . ." Ala. Code § 38 (9)(6) (1985); Fla. Stat. Ann. § 415 (105) (West 1986); Md. Ann. Code art. 14, § 304, Md. Est. & Trusts Code Ann. § 13 (709)(a) (1985); N.Y. Soc. Serv. Law § 473a (1-4) (McKinney 1984-5); N.C. Gen. Stat. § 108a (106) (1985); Okla. Stat. Ann. tit. 43a, § 808 (West 1985); S.C. Code Ann. § 43 (29)(80) (Law. Co-op 1985); Tenn. Code Ann. § 14 (125-107)(a) (1985); Utah Code Ann. § 55 (19)(5.5) (1985); and Wis. Stat. Ann. § 55.05(4) (West 1984-85). Each of these provisions vary in their concern for due process of law. For example, New York's legislation provides a hearing on the merits of the petition; the respondent is given notice of the hearing, the right to be present, and a right to counsel. Upon a finding of clear and convincing evidence, short-term adult involuntary services may be ordered for a period not to exceed 72 hours. N.Y. Soc. Serv. Law § 473a (5-6f) (McKinney 1984-5). In contrast, South Carolina's emergency services provides no mention of notice to the respondent of a petition hearing or to have counsel represent him or her at the proceedings. In fact, the statute specifically states that "any person may appear to oppose or join in the petition . . . ., but notice to such relative or interested person is not required." Furthermore, a subsequent hearing on the need for continued involuntary services in not required until 90 days after the initial granting of the petition. S.C. Code Ann. § 43 (29)(80) (Law. Co-op 1985). The constitutionality of depriving persons of their liberty for an extended period of time without notice and an adversary hearing is certainly tenuous. \textit{See infra} notes 47-52 and accompanying text.

this type of protective services legislation lacks procedural safeguards and suffers from vague and inappropriate standards for identifying who shall receive such services.\textsuperscript{43} Alabama, South Carolina, and Tennessee's legislation, for example, provide no mention of the evidentiary standard of proof needed to permit involuntary intervention.\textsuperscript{44}

Similarly, notice of the proceedings and the right to be present at his or her hearing on the justification for services is absent in Florida's and South Carolina's protective services statutes.\textsuperscript{45} Protective services legislation in Connecticut, Oklahoma, Tennessee, and Utah provide the right to counsel but fail to define the role s/he is to perform.\textsuperscript{46} This is a critical omission because many attorneys may see their function as guardian ad litem, doing what they believe is in the best interest of the client, rather than presenting an adversarial defense.\textsuperscript{47}

\textsuperscript{42} Five states permit or make reference to protective placement in institutions. South Carolina's legislation, for example, reads as follows:

\begin{quote}
The department, an agency, or a guardian may request the family court or other court exercising jurisdiction to provide protective placement of an individual for purposes of care and custody. No protective placement may be ordered unless there is a determination by the court that the individual is unable to provide for his own protection from abuse or neglect by another or himself . . . . Placement may be made to such facilities as nursing homes, boarding homes, personal medical institutions, foster care services or to other appropriate facilities.
\end{quote}


\textsuperscript{43} See infra text accompanying notes 43-68; see supra note 40; see also The New Paternalism and Intervention, supra note 19, for an excellent discussion on the lack of due process in protective services legislation.


\textsuperscript{47} It needs to be pointed out that the remaining states which have specific protective services legislation provide the right to a guardian ad litem. See, e.g., ALA. CODE § 38 (9)(6)(a) (1985); FLA. STAT. ANN. § 410 (103)(2) (West 1986); N.Y. SOC. SERV. LAW § 473a (IV) (McKinney 1984-5); N.C. GEN. STAT. §§ 108a, 105(b) (1985); S.C. CODE ANN. § 43 (29)(30-100) (Law. Co-op 1985); and WIS. STAT. ANN. § 55.06(6) (West 1984-85). Therefore, it may be assumed that counsel in those states which statutorily fail to define the attorney's role, function in a nonadversarial manner. An attorney acting in a parens patriae fashion may be detrimental to the client's rights and personal freedom. Past research has shown that attorneys who act in the "best interests" of the individual most often defer to psychiatric judgment; which in turn, results in the "rubber stamping" of
Furthermore, in a number of states the assistance of counsel is absent most often in protective services legislation which allows for emergency involuntary intervention. Emergency situations may make it impossible for the court to insure the assistance of counsel at that particular time. However, it has generally been recognized that the importance of the interests involved make the assistance of counsel imperative as soon as possible after the proceedings have begun. The assistance of counsel at the early stages of the proceedings is crucial given the involuntary intrusion into one's liberty and the length of the deprivation before a full hearing is required (up to thirty days in Alabama, and ninety days in South Carolina).

The constitutionality of depriving persons of their liberty for extended periods of time without an adversarial hearing may be in violation of the due process clause. In Alabama, after an initial determination by the court that "care is urgently and immediately necessary," individuals may be involuntarily detained up to ten days before notice is given explaining cause for such action. A hearing on the appropriateness of the detention is not required until thirty days after the signing of the initial petition. The situation is worse in South Carolina, where an individual is given no notice and can be involuntarily deprived of their liberty for a period not to exceed ninety days. The state may sometimes have a compelling interest in the emergency detention of persons for the protection of society and themselves. However, such deprivation of liberty requires the individual to be given no-constitutional rights and an over utilization of involuntary intervention. Cohen, The Function of the Attorney and the Commitment of the Mentally Ill, 44 Tex. L. Rev. 424 (1966) (forty patients committed in a span of seventy-five minutes); Miller & Schwartz, Court Lunacy Commission Hearings: Some Observations of Commitments to a State Mental Hospital, 14 Soc. Probs. 26 (1966); for a more recent example, see Stier & Stoebe, supra note 4.


49. See Lessard, 349 F. Supp. at 1099; Argensinger v. Hamlin, 407 U.S. 25, 31 (1972) ("the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel") (quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932)); In re Gault, 387 U.S. 1, 36 (1967) (the individual who is deprived of his or her liberty, "needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it").


54. Id.

tice and a hearing to determine probable cause to justify the need for continued intervention. Surely ninety days, and for that matter even thirty days, is an excessive amount of time to allow the involuntary deprivation of an individual's liberty interest without notice and due process of law. "Even a short detention in an institution may have long lasting effects on a person's ability to survive in the outside world."

Protective services legislation also may lack specificity in identifying who needs protective services and/or protective placement. Statutes may simply require that an individual be unable to care for him or herself adequately or protect himself from abuse or exploitation from others before intervention is permitted. Terms such as "abuse," "neglect," and "exploitation" are often vaguely defined and allow personal views to dictate what constitutes a "normal" lifestyle. Such "unbridled" discretion may lead to arbitrary deprivation of individual freedom and rights.

56. Lessard, 349 F. Supp. at 1091; Morrissey v. Brewer, 408 U.S. 471 (1972) (loss of liberty involved in parole revocation is a serious deprivation requiring that the parolee be given notice and hearing).
57. Lessard, 349 F. Supp. at 1091.
58. See supra note 19 and accompanying text.
59. See supra notes 20-23 and accompanying text.
60. Protective services legislation, for example, in Utah interprets "abuse" as: "physical injury, unreasonable confinement, or deprivation of life sustaining treatment." UTAH CODE ANN. § 55 (19)(1)(5) (1985); see also TENN. CODE ANN. § 14 (25-102)(1) (1985). This definition fails to specify whether the physical injury must be intentional before it constitutes abuse, or whether the threatened harm must be life threatening. Nor does it define how recent the act or omission needs to be before it falls within the law.
61. Maryland's law defines "neglect" as: "the willful deprivation of a vulnerable adult of adequate food, clothing, essential medical treatment or habilitative therapy, shelter, or supervision." MD. ANN. CODE art. 14, § 101(L)(1) (1985). A "vulnerable" adult is one who lacks the physical or mental capacity to provide for his or her daily needs. MD. ANN. CODE art. 14, § 101(q) (1985). The term "adequate" is open to a variety of interpretations, e.g., what is an adequate amount of food or essential shelter?
62. An examination of Alabama's protective services statute indicates that exploitation is an "unjust or improper use of another person's resources for one's own profit or advantage or for the profit or advantage of another person." ALA. CODE § 38 (9)(2)(8) (1985). It fails to define what is an "unjust or improper" use of another's resources, or what dollar amount, if any, constitutes a profit or advantage.
63. See In re Sealy, 218 So.2d 765 (Fla. Dist. Ct. App. 1969) (doctors testified that a "hippie" who believed in a free lifestyle, nonviolence, and the use of drugs, was mentally ill). The lack of substantive specificity and procedural safeguards in protective services legislation resembles the legal framework and rhetoric contained in pre-civil commitment reform legislation which has been viewed for the most part as constitutionally unacceptable. See supra note 1; La Fond, An Examination of the Purposes of Involuntary Civil Commitment, 30 BUFFALO L. REV. 499 (1981); N. Kittredge, The Right To Be Different: Deviance and Enforced Therapy (1971); Curtis, The Checkered Career of Parens Patriae: The State as Parent or Tyrant?, 25 TEX. L. REV. 895 (1976); Note, Developments
Typically, protective services legislation emphasizes an individual’s inability to function and the underlying conditions that cause these disabilities. Regan addresses the issue whether state intervention should be permitted solely on the basis of behavioral limitations or whether some underlying cause, (e.g., incompetency), needs to be proved as well. The requirement of both criteria imposes a reliance on psychiatric judgment, which lends itself to the possibility for abuse.

Conversely, examination of functional shortcomings focuses on the outcome of an individual’s behavior, rather than the underlying decision making process. Depending on the perspective taken, this may lead to either the denial of needed treatment and care or the possibility of greater intrusion into an individual’s privacy.

Both sides of the issue have their merits. However, before a resolution to this dilemma can occur, specific criteria is needed in defining causes, how they are linked to functional shortcomings, and what behavior justifies a need for involuntary intervention.

In light of the inadequate substantive and procedural standards in protective service legislation, and the tendency to have mentally disabled persons “shuffled” to methods lacking statutory safeguards, questions arise concerning how persons no longer meeting the stringent criteria for civil commitment are processed under the auspices of this provision. The following section will address this question by examining Wisconsin’s civil commitment law and its process of protective placement.

III. CASE STUDY: WISCONSIN

In response to Lessard v. Schmidt, the Wisconsin legislature re-
formed the civil commitment code and enacted new protective services legislation which contained a provision for emergency detention and protective placement. Civil commitment and protective placement differ in important respects. The primary objective of protective placement is to confine individuals suffering from long-term disabilities who are incapable of providing for their own care and are a danger to themselves or others. Civil commitment, on the other hand, is concerned with mentally ill individuals who are also dangerous but require treatment. Therefore, the process of protective placement should be used for persons needing care and custody, while individuals requiring psychiatric treatment should be civilly committed.

Both statutes require some evidence of dangerousness. Yet, the degree of "dangerousness" specified is the most noticeable difference between the two statutes. The protective placement statute requires that a substantial risk of serious harm to the individual or others should be present, and evidenced by overt acts or acts of omission. This is less than the civil commitment requirement of dangerousness which must be represented by a substantial probability of serious physical harm evidenced by recent acts, or threats of homicide, suicide or other violent behavior.

The protective placement legislation also provides fewer procedural


71. WIS. STAT. ANN. § 51.20(1), (2)(a-d) (West 1984-85). An exception to this standard is when a person, as a result of impaired judgment, recent acts or omissions, is likely to cause physical impairment or injury to oneself. See WIS. STAT. ANN. § 51.20(2)(c) (West 1984-85).

72. WIS. STAT. ANN. §§ 880.33(2), 55.06(1)(2) (West 1984-85). Indeed, it is customary for the guardianship hearing and the proceedings for protective placement to be held back to back. M. AXILBUND, EXERCISING JUDGMENT FOR THE DISABLED 12 (1979). The process of civil commitment does not require a finding of incompetency before a person may be involuntarily confined. WIS. STAT. ANN. § 51.59(1) (West 1984-85). Wisconsin's legislation defines "incompetency" as when a person is unable to make decisions regarding his or her care or finances. WIS. STAT. ANN. § 880(4) (West 1984-85).
safeguards than are necessary for civil commitment, even though protective placement assumes long-term confinement. For example, a person who is facing involuntary civil commitment is entitled to counsel, while an individual involved in protective placement proceedings is appointed a guardian ad litem. Likewise, a respondent facing civil commitment has a right to attend his or her own hearing. An individual facing protective placement has that same right, but it may be waived if a guardian ad litem certifies that the person is unable to attend.

Despite the substantive and procedural differences between these two laws, similarities exist. First, both civil commitment and protective placement permits the deprivation of an individual's liberty for the protection of himself or others. Second, both processes deal with individuals who may be mentally ill. Lastly, the reformed civil commitment statute itself has built-in procedures which permit the court to proceed at the probable cause hearing and final hearing as if a petition had been made for protective placement. In Wisconsin, for the most part, all emergency mental health detentions are processed as if they were emergency civil commitments. A probable cause hearing must be held within seventy-two hours. At that time, a decision is made by the court to either begin proceedings for civil commitment or protective placement. If probable cause is lacking, a dismissal of all proceedings occurs.

Essentially, protective placement and civil commitment seem identical. A theoretical difference does exist in terms of their objectives; protective placement focuses on persons needing care and custody due to a permanent disability, while civil commitment centers on individuals who require treatment. However, this theoretical distinction becomes blurred when one considers the ethical, political and social factors

79. Wis. Stat. Ann. § 51.20(3) (West 1984-85); see also State ex rel. Memmel v. Mundy, 75 Wis. 2d 276, 283-84, 249 N.W.2d 573, 577 (1977), (counsel appointed in civil commitment proceedings has the same function, duties, and responsibilities as retained counsel in any civil proceedings). This mandatory appointment of adversary counsel at the initiation of the commitment process replaced the appointment of a guardian ad litem.

which influence psychiatric judgment. This, coupled with the overlaps that exist between protective placement and civil commitment procedures, and the contrasting due process protections that exist between these two processes, raises questions concerning the extent to which individuals who should be civilly committed are instead protectively placed. The following sections address this issue.

A. Empirical Research and Judicial Scrutiny

Little research exists which has examined the impact of Wisconsin’s revised civil commitment law on providing procedural and substantive due process to mentally disabled individuals. The research that has been conducted suggests that legal avenues lacking due process protections are used as an alternative to civil commitment. For example, some research shows that persons who normally would have been subject to civil commitment were arrested for minor crimes (e.g., disorderly conduct) and committed as incompetent to stand trial. At the end of the incompetency commitment period (six months), the criminal charges were generally dropped.

The Institute on Mental Disability and the National Law Center for State Courts also examined the implementation of Wisconsin’s civil commitment law and found that twenty-five to sixty percent of all involuntary civil commitment cases were diverted by means of “negotiated settlements,” or “stipulated voluntaries.” Under negotiated settlements, individuals agreed to receive outpatient treatment for a specified period of time, ranging from three days to ninety days.


90. Dickey, Incompetency and the Nondangerous Mentally Ill Client, 16 CRIM. L. BULL. 22 (1980). Dickey examined data from three Wisconsin mental health institutions to arrive at his conclusion. Id.

91. Citing a lack of community resources and an awareness of existing alternatives, Dickey concluded that the push for deinstitutionalization of nondangerous mentally ill persons in Wisconsin was theoretically sound but difficult to implement. Id. at 37-40.

92. I. Keilitz & B. McGraw, AN EVALUATION OF INVOLUNTARY CIVIL COMMITMENT IN MILWAUKEE COUNTY (1983). This study focused on Milwaukee County and was limited to interviews, observations and staff discussions.

93. Id. at 71.

94. Id. at 73.
settlements occurred most often prior to the probable cause hearing with no serious questioning by the probate court commissioner. All court proceedings against the person were postponed. At the conclusion of the time period, the matter was either dismissed or the case was reopened due to the belief that the respondent did not comply with the conditions of the settlement.95

A stipulated voluntary is similar to a negotiated settlement, but individuals agree to inpatient treatment.96 Judicial proceedings may be adjourned for up to six months, or until one of the following occurs: (a) the respondent’s counsel notifies the court that his client desires a court hearing, or (b) the staff of the treatment facility no longer considers the individual a proper subject for inpatient treatment.97

On its face the utilization of settlements is a means of avoiding unnecessary institutionalization and litigious confrontation in civil commitment proceedings. Questions arise, however, concerning the constitutionality of such practices. Wisconsin’s Mental Health Law contains no specific provisions for a waiver by the court of the statutory required hearings, nor for an adjournment of official proceedings for a period of six months.98 These practices may be reflective of the use of the least restrictive alternative principle in the civil commitment process,99 but this should not be accomplished at the expense of procedural safeguards.100

95. Id.
96. Id. at 74.
97. Id.
98. A preliminary hearing must be held within 72 hours of detention exclusive of weekends or holidays. Wis. Stat. Ann. § 51.20(7)(a) (West 1984-85). Violation of time limits is a jurisdictional defect. State ex rel. Lockman v. Gerhardtstein, 107 Wis. 2d 325, 329-30, 320 N.W.2d 27, 38 (Wis. Ct. App. 1982). After a determination of probable cause, the state statute does allow the court to order the release of an individual from detention pending the final hearing, if acceptance of treatment is made a condition of such release. A final hearing must then be held within 30 days, unless the proceedings have been dropped. Wis. Stat. Ann. § 51.20(8) (West 1984-85).
99. The first section of the civil commitment law states: “To protect personal liberties, no person who can be treated adequately outside of a hospital, institution or other inpatient facility may be involuntarily treated in such a facility.” Wis. Stat. Ann. §§ 51.001(1-2), 51.20(13)(f) (West 1984-85). A major legislative author of the civil commitment law, former representative Mary Lou Munts, has also noted that “[T]he principle of the ‘least restrictive alternative’ reflects our belief that most persons in need of mental health treatment are best served in their own communities.” Dickey, supra note 90, at 28.
100. See generally Lessard, 349 F. Supp. at 1078; see also supra note 10. It needs to be noted that the findings in I. KELITZ and B. McGRAW, supra note 92, are encouraging. Zander, for example, examined the impact of Lessard on civil commitment in Wisconsin with specific focus on Dane and Milwaukee counties prior to becoming state legislation. Zander, supra note 4. Zander found that Milwaukee county, in contrast to Dane county,
The overall findings from Wisconsin support past research results and claims that alternative methods of processing mentally disabled individuals will be used or adopted to bypass stringent statutory civil commitment standards. Yet no empirical research exists which has specifically examined whether similar interactions are occurring between civil commitment and protective placement statutes nationally or in Wisconsin.

One study, however, focused on the implementation of protective services and protective placement in Wisconsin in the late 1970's. The study found a heavy emphasis toward the use of protective placement (confinement) rather than on the delivery of services or the use of community alternatives (for example, home visits by a nurse or social worker). In fact, judicially ordered services were rare. The study concluded that the concept of protective services has not been uniformly or fully developed, and that "obscuring language should be stripped from this disguised civil commitment statute." Theoretically, persons protectively placed should manifest disabilities which are likely to be permanent or chronic, and should present a substantial risk of committing serious harm to themselves or others. A study by Wisconsin's Division of Community Services was deferred to psychiatric judgment, relied on hearsay evidence (defendant's record at hospital and nursing notes), did not require a finding of dangerousness and justified commitment on mental illness and decision making ability alone. Id. at 547. As a result, markedly different dispositional tendencies occurred. The most remarkable was that the percentage of individuals committed in Milwaukee was nearly four times the percentage committed in Dane county. Id. at 508, 553. In contrast, Dane county relied more heavily on other alternatives, such as outpatient treatment programs or voluntary hospitalization which was congruent with the intent of Lessard. Id. at 553. In short, Dane county processed mentally ill individuals according to the judicial mandates of Lessard while Milwaukee county did not.

101. See supra notes 4, 5 & 6.
102. See The Structure of Civil Commitment, and D. Wexler, supra note 7.
103. See supra note 19.
104. M. Axilbund, supra note 78.
105. Id. at 11-12.
106. Axilbund indicates that this is not really a surprising finding since the great bulk of the protective services statute deals with procedures for instituting protective placement. Id. at 12.
107. Id. at 18-19. See also T. Johnson & K. Streit, An Analytical Report on Protective Services and Guardianship in Wisconsin 22 (1978) (recommending that the use of the term protective services be abandoned because it has no generally accepted meaning within the state of Wisconsin).
109. Seven hundred ninety reports, representing 779 persons, were used in the study. Data were collected from copies of court related comprehensive reports, initial comprehensive evaluations and status reviews that had been prepared during April to October.
ducted to determine if these factors were in fact characteristic of those persons protectively placed. Similar to other findings, \textsuperscript{110} ninety-two percent of those persons protectively placed were in institutions; \textsuperscript{111} eighty-three percent of those were placed in nursing homes as opposed to foster homes. \textsuperscript{112} The largest single age group of men protectively placed was between twenty-two and thirty-five, while the largest single age group of women ranged between seventy-five and ninety-nine. \textsuperscript{113} In the United States, the typical nursing home resident is an eighty year old woman. \textsuperscript{114} The average age of persons in nursing homes in Wisconsin is seventy-six. \textsuperscript{115} However, the ages of those individuals protectively placed in nursing homes varies from ten to ninety-nine years, with the average age being fifty-eight. \textsuperscript{116} The sample in this study also revealed that only twenty-five percent of those individuals protectively placed in nursing homes were seventy-five or older. \textsuperscript{117}

The findings also suggest that sick, confused and elderly women are being protectively placed into nursing homes for needed medical care and support. \textsuperscript{118} This does not appear to be true for men. The majority of protectively placed persons had diagnoses and problems/difficulties of a behavioral nature, which do not necessarily require medical treatment services offered by nursing homes. \textsuperscript{119} An important conclusion which can be drawn from the data is that the great majority of protectively placed persons had diagnoses (ninety-nine percent) and difficulties (eighty-five percent) of a behavioral nature (such as combative, suicidal, wandering, confused or drug abuse behaviors) rather than medical problems. The following is crucial: that young males exhibiting dangerous tendencies, suffering from disabilities which are not necessarily chronic, are confined in a nursing home. This finding suggests that protective placement is being used as a method to bypass the more stringent process of civil commitment.

\textsuperscript{109} M. AXILBUND, supra note 78.
\textsuperscript{110} It needs to be noted that the study did not examine the use of protective services but focused instead on the implementation of protective placement.
\textsuperscript{111} N. HOWLAND, R. KRUEGER & J. ZITSKE, supra note 109, at 27.
\textsuperscript{112} Id. at 38.
\textsuperscript{113} See SPECIAL COMMITTEE ON AGING, NURSING HOME CARE IN THE UNITED STATES: FAILURE IN PUBLIC POLICY 16 (1974); P. GRIMALDI, MEDICAID REIMBURSEMENT OF NURSING HOME CARE 10 (1982).
\textsuperscript{114} Id.
\textsuperscript{115} Id. at 38.
\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} Id. at 53.
\textsuperscript{119} Id. at 52-71.
The significance of this finding was demonstrated when the Wisconsin State Supreme Court ruled that temporary emergency diagnosis and treatment powers granted under the protective placement statute violated equal protection principles. The court ruled that the utilization of such procedures was identical in scope and purpose to the pre-trial detention provisions of the civil commitment law. Therefore, protectively placed individuals should be accorded the same rights that are normally awarded to persons involuntarily confined in pretrial detention proceedings. These rights include the appointment of a lawyer, notice of hearings, rights and allegations, and a probable cause hearing within 72 hours of detention.

Prior to this decision, persons were being detained under protective placement for the purpose of receiving psychiatric and acute care ser-

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120. State of Wisconsin v. Combined Community Service Board of Milwaukee County, 122 Wis. 2d 65, 362 N.W.2d 104 (1985).
121. Wis. STAT. ANN. § 55.06(9)(d) and (e) were at issue. These sections state: "[t]ransfer of placement may be made by a guardian to a facility providing acute psychiatric treatment for the purpose of psychiatric diagnosis procedures for a period not to exceed 10 days." Wis. STAT. ANN. § 55.06(9)(d) (West 1984-85). "Temporary transfer of placement may be made for emergency acute psychiatric inpatient treatment with prior notice to the guardian when feasible. Such treatment period may not exceed 15 days . . . ." Wis. STAT. ANN. § 55.06 (9)(e) (West 1984-85).
122. Wis. STAT. ANN. §§ 51.15, 51.20(1-7) (West 1984-85) discussed in Combined Community Service, 122 Wis. 2d at 87, 362 N.W.2d at 115.
123. Id. at 87-89, 362 N.W.2d at 115-16.
124. Wis. STAT. ANN. § 51.20(1-7) (West 1984-85) discussed in Combined Community Service, 122 Wis. 2d at 88-89, 362 N.W.2d at 116.
125. The court also ruled on two additional issues. First, persons protectively placed were given the right to an annual review by a judicial officer (court commissioner) to determine the need for continued confinement or the appropriateness of the present placement facility. Combined Community Service, 122 Wis. 2d at 84, 362 N.W.2d at 113. Guardians ad litem must also be appointed to advise patients of their rights, including the right to a due process hearing, and to submit a report to the court concerning the need for confinement and proper place for care. Id. at 85, 362 N.W.2d at 113. Prior to these standards, protective placements were indefinite in duration and were "tantamount to a life sentence to a nursing home or other custodial setting." Id. at 76-77, 362 N.W.2d at 110.

The second major issue decided by the court was that guardians do not have the statutory authority to consent to confinement in a mental hospital for individuals who are not protectively placed and who have not consented to such hospitalization. Id. at 91-92, 362 N.W.2d at 117. This ruling is controlled by the court's earlier decision that equal protection demands the requirements of the pretrial detention sections of the civil commitment law be applied to persons protectively placed. Id. "Guardianship by itself does not justify the involuntary hospitalization of an adult without the procedural protections afforded under 51.15 and 51.20." Id. One possible reaction to this decision could be that guardians or social workers will encourage persons to "voluntarily" admit him/herself to a nursing home or custodial setting in an effort to avoid these mandates. This would raise questions as to the client's ability to consent to such proceedings.
vices. These services are generally available to civilly committed individuals. As noted earlier, protective placement is intended for individuals having a disability which is permanent or likely to be permanent, and should not require psychiatric treatment.

IV. IMPLICATIONS

This analysis of protective services and civil commitment in Wisconsin suggests that a "gray" area does exist in implementation between these two processes. Protective services legislation should receive closer judicial, legislative and scholarly scrutiny to determine the extent to which interactions between this process and civil commitment are occurring. The lack of substantive specificity and procedural safeguards in protective services legislation alone should raise concerns regarding the purpose and scope of such legislation.

Courts and legislators should recognize that adherence to the principle of parens patriae in specific protective services legislation is "an invitation to procedural arbitrariness." Although the guarantee of procedural due process is not absolute and is relative to the interests involved, involuntary confinement, whether for rehabilitation, treatment or training requires antecedent constitutional safeguards.

Benevolent intentions that provide little protection from unjust deprivation of rights, loss of liberty and perhaps even life, are not sufficient. A dominant theme within the majority of protective services

128. See supra notes 20-23 & 40-52.
129. As Justice Brandeis stated in his dissenting opinion: "[e]xperience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent . . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting). See also Justice Fortas' comments regarding his dissatisfaction with the principle of parens patriae. In re Gault, 387 U.S. at 18-19; see also Horstman, supra note 21.
131. See Hervford v. Parker, 396 F.2d 393, 396 (10th Cir. 1968); Lessard, 349 F. Supp. at 1078; In re Gault, 387 U.S. at 18-19; Jackson, 406 U.S. at 720-23; O'Connor, 422 U.S. at 580.
132. "Involuntary confinement is the most serious deprivation of individual liberty that a society may impose." Livermore, Malmquist & Meehl, supra note 89, at 75. The fact that a deprivation of liberty was benevolently motivated provides little justification or comfort to that individual. The "rationale neither minimizes the deprivation nor eliminates the need for procedural safeguards." Douglas, Feinberg, Jacobsohn & Stock, supra note 38, at 442 n.103 (citing Sherman, Guardianship: Time for a Reassessment, 49 Fordham L. Rev. 350, 362 (1980). See supra note 129; Lessard, 349 F. Supp. at 1078.
legislation is the utilization of the least restrictive alternative doctrine. However, findings from Wisconsin suggest that this may be more rhetoric than reality. The least restrictive alternative doctrine suggests that government intervention should not intrude upon individual liberty and other constitutional rights to a greater degree than is necessary to achieve a legitimate purpose. A heavy emphasis on confinement, especially in a nursing home rather than the delivery of services is not an appropriate method of implementing this doctrine. Surely, studies have already suggested that it is not. Institutionalization, whether in a nursing home or a mental health facility, generates or increases feelings of hopelessness which are, in turn, negatively associated with survival. Institutionalization actually increases the likelihood of death rather than promoting a "normal" lifestyle or one that

one commentator contends:

Measures which subject individuals to the substantial and involuntary derivations of their liberty contain an inescapable punitive element, and this reality is not altered by the fact that the motivations that prompt incarceration are to provide therapy or otherwise contribute to the person's well-being or reform. As such, these measures must be closely scrutinized to insure that power is being applied consistently with those values of the community that justify interference with liberty for only the most clear and compelling reasons.


133. ALA. CODE § 38 (9)(6)(c) (1985) is reflective of most protective services legislation which contains this concept. "The court shall give preference in making a determination to the least restrictive alternative considered to be proper under the circumstances, including a preference for noninstitutional care whenever possible." Id. See also N.Y. Soc. Serv. Law § 473a (10)(g) (McKinney 1984-5); OKLA. STAT. ANN. tit. 43a, § 807(b) (West 1988); S.C. CODE ANN. § 43 (29)(30)(3) (Law. Co-op 1985); UTAH CODE ANN. § 55 (19)(4)(7)(f) (1985); and WIS. STAT. ANN. §§ 55.06(9)(a), 51.20(7)(a), 51.20(8) (West 1984-85).

134. See Shelton v. Tucker, 364 U.S. 479, 488 (1960); Lake v. Cameron, 364 F.2d 657 (D.C. Cir. 1966). There is some disagreement, however, as to the doctrine's meaning and purpose as it applies to civil commitment. See Hoffman & Foust, Least Restrictive Treatment of the Mentally Ill: A Doctrine in Search of Its Senses, 14 SAN DIEGO L. REV. 1100 (1977). "As administration of the doctrine varies among jurisdictions, so does opinion about its scope." Id. at 1119. In general, the doctrine seems to be concerned with the restrictiveness of treatment on one's liberty interests in comparison to its overall effectiveness. Id. at 1104, specifically n.3.


137. Several commentators found that an experimental group receiving protective services had a higher rate of institutionalization and death than did the control group which did not receive any kind of state intervention. M. BLENNER, M. BLOOM, M. NIELSEN & R. WEBER, supra note 22, at 133-38; see also Lessard, 349 F. Supp. at 1089 (statistics indicate that an individual confined in an institution has a much greater chance of dying than if he were left at large).
is free from deterioration. 138

Many of the individuals protectively placed into nursing homes are indistinguishable from persons who might be civilly committed. 139 Since nursing homes emphasize medical and nursing care, rather than the psychological, developmental or recreational programming, inherent problems arise. 140 Similarly, an individual confined in an institution for the mentally retarded has a right to adequate training to ensure at least safety and freedom from undue restraint. 141 It is questionable whether nursing home staff can even meet this standard when attempting to service the varying needs of not only the mentally retarded but other chronically ill persons, as well as the aging, the young and those needing acute care. It is foreseeable that these different groups of people would interfere with each other and that a staff trained for one type of resident might not be able to meet the diverse needs of another. 142 When coupled with the possibility that a nursing

138. A follow-up study of those persons affected by Halderman v. Penhurst State School and Hospital, 446 F. Supp. 1295 (E.D. Pa. 1977), has indicated that within two years individuals moved from the institution gained close to 6.5 points more in adaptive behavior than those persons still confined. V. Bradley & J. Conroy, The Five Year Longitudinal Study of Court-Ordered Deinstitutionalization of Penhurst: Third Year Comprehensive Report 6 95-96 (1982). These findings may be misleading since persons who remained in the institution could have been worse from the beginning in terms of adaptive behavior than those released. Still, numerous studies have shown the debilitating effect confinement has on a person's well being. See J. Zitske & B. Hallgren, Life in Limbo: A Report on People with Disabilities in Nursing Homes (1980).


140. N. Howland, R. Krueger & J. Zitske, supra note 109, at 79; B. Vladeck, Unloving Care: The Nursing Home Tragedy (1980).


142. Freedman & Moran, Wanderers in a Promised Land: The Chronically Mentally Ill and Deinstitutionalization, 22 Med. Care S29 (1984); A. Strauss, L. Schatzman, R. Bucher, D. Ehrlich, M. Sabshin, Psychiatric Ideologies and Institutions (1984); T. Szasz, Law, Liberty and Psychiatry: An Inquiry into the Social Uses of Mental Health Practices (1963). On a more general note see Leonard, Care Urged in Mixing Mentally Ill of Varied Ages, Knickerbocker Newspaper, April 3, 1985, at IB, col. 1. As it is, nursing homes are "seriously inadequate and offer an environment even more adverse to an elderly person than a mental hospital." Krauskopf, New Developments in Defending Commitment of the Elderly, 10 N.Y.U. Rev. L. & Soc. Change 367, 368 (1980-81). This is a depressing statement, especially when one considers that 50% to 60% of older persons admitted to mental hospitals die during the first year. Lessard, 349 F. Supp. at
home may be lacking in trained staff, this could result in inadequate nutrition, over-medication, serious emotional and physical injuries resulting from attacks by dangerous individuals, or unnecessary restraint and seclusion.

The most tragic consequence of mixing persons of varying needs, however, is that neither group is likely to be provided the opportunity to progress towards independent living. Even for those individuals diagnosed as suffering from a chronic disability, a possibility exists that the need for residential care and custody may change. Doubt has already been cast on the ability of institutions to provide either a stable or meaningful environment where therapeutic progress can be made. The mixing of different population groups who have diverse needs will create a situation which ensures that institutionalization will be permanent. This, in turn, could lead to increasing boredom, deterioration and death. The use of protective placement, especially as a means of involuntary confinement, raises serious questions concerning personal autonomy, care, treatment and the practicality of including a least restrictive alternative provision within protective service legislation.

V. CONCLUSION

In response to a perceived inability to humanely and effectively treat
persons who need help,\textsuperscript{149} the current trend in mental health processing is again towards expanding the scope of the state's authority to involuntarily hospitalize mentally and physically disabled individuals.\textsuperscript{150} Issues of care and treatment, and unjust deprivation of liberty and individual rights should not be lost in this transition towards a "medical" model approach to civil commitment. As a result of this movement, it is expected that the adoption of more stringent due process safeguards in protective services legislation or its abolition will not occur.\textsuperscript{151}

At best, it is hoped that voluntary services and outpatient resources, as opposed to involuntary confinement, will be utilized and encouraged in the implementation of protective services.\textsuperscript{152} The role of the nursing home needs to be redefined and conditions within such places should receive greater scrutiny by the courts and legislators. Redirection of federal incentives\textsuperscript{153} and sweeping revisions of federal rules\textsuperscript{154} could

\textsuperscript{149} Specifically, it is argued that mentally disabled persons are denied treatment, confined in inappropriate facilities or they are among the homeless sleeping in alleyways "dying with their rights on." Treffert, \textit{Dying With Their Rights On}, 130 AM. J. PSYCHIATRY 1041 (1973); Roth, \textit{Mental Health Commitment: The State of the Debate}, 1980, 32 HOSP. & COMMUNITY PSYCHIATRY 385 (1980). \textit{See generally}, Bassuk, \textit{The Homelessness Problem}, 251 SCI. AM. 40 (1984); \textit{supra} notes 4-6 and accompanying text.

\textsuperscript{150} At least three states have revised their civil commitment laws by adopting less stringent substantive criteria. For example, the state of Washington recently changed their commitment legislation by broadening the definition of "gravely disabled." \textit{See Estate of Roulet}, 152 Cal. Rptr. 425, 590 P.2d 1, 9 (1979) ("it [is] easier to commit gravely disabled persons than imminently dangerous persons"). \textit{See also} WASH. REV. CODE ANN. § 71.05.150 (1985); ALASKA STAT. § 47.30.915 (7)(B) (1984); TEX. STAT. ANN. art. 5547-50(b)(2)(iii) (Vernon 1985); Durham & La Fond, \textit{The Empirical Consequences and Policy Implications of Broadening the Statutory Criteria for Civil Commitment}, 3 YALE L. & POL'Y REV. 385 (1985); Stromberg & Stone, \textit{A Model State Law on Civil Commitment of the Mentally Ill}, 20 HARV. J. ON LEGIS. 275 (1983). For a critique of the model state civil commitment law, see Schmidt, \textit{Critique of the American Psychiatric Association's Guidelines for State Legislation on Civil Commitment of the Mentally Ill}, 11 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 11 (1985).

\textsuperscript{151} \textit{See}, e.g., \textit{In re Bryne}, 402 So.2d 383 (Fla. 1981). The Florida Supreme Court upheld statutory emergency protective placement procedures that did not include a right of notice, an opportunity to be heard or effective assistance of counsel. \textit{Id.} at 385.

\textsuperscript{152} \textit{The New Paternalism}, \textit{supra} note 19, at 1117-27.

\textsuperscript{153} Medicaid creates incentives to move individuals out of large state institutions into smaller ones, primarily, nursing homes. The primary reason for the reliance on these facilities is the availability of federal Medical Assistance or Title XIX funding for nursing homes. Often, counties have a fiscal incentive to place persons in nursing homes which are paid for with federal/state medical assistance dollars rather than place individuals in the community which would require state and county dollars. D. \textit{GREENLEY}, \textit{supra} note 139, at 10-11; Gronfein, \textit{Incentives and Intentions in Mental Health Policy: A Comparison of the Medicaid and Community Mental Health Programs}, 26 J. HEALTH & SOC. BEHAV. 192 (1985). The federal government and individual states need to create
provide an answer to the over utilization of the nursing home, and non-use of day centers and other community facilities. Finally, more research is needed to study specific protective services legislation and the extent to which such a process interacts with civil commitment. Until these objectives are accomplished, the unwanted may simply be placed in another institution where false hopes and despair prevail. Let us not regress to the mistake of the past where unchecked discretion in the name of treatment and care resulted in arbitrariness and a denial of personal autonomy.

incentives which will develop and encourage the use of support services in the community rather than institutionalization. See J. Rubin, Economics, Mental Health and the Law 98-105, 158-71 (1978); P. Grimaldi, supra note 114, at 107-10. A few such alternatives could entail the use of state funds to create a program which would screen persons about to enter a nursing home and attempt to purchase services for individuals who should remain in the community, or utilize federal medical assistance waivers to pay for community services. See D. Greenley, supra note 139, at 11.

154. The Department of Health and Human Services is in the process of proposing tougher standards for nursing homes to improve the quality of care and the protection of individual rights. These proposals could require thousands of nursing homes to hire more staff and provide large amounts of additional training to nurse’s aides, who are responsible for up to 90% of the care given to patients in such places. N.Y. Times, June 15, 1987, at 1, col. 1. See also US Proposing Tougher Rules for Nursing Homes, The Milwaukee J., July 5, 1987, at 1, col. 7A.